Supreme Court of the United States

OCTOBER TERM, 1925

No. 57

GREAT NORTHERN RAILWAY COMPANY, a corporation, Petitioner

vs.

CHARLES W. REED and DORA REED, his wife, Respondents

CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Petitioner

F. G. DORETY
St. Paul, Minnesota
THOMAS BALMER
EDWIN C. MATTHIAS
302 King Street Passenger Station, Seattle, Washington
Solicitors for Petitioner

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STATEMENT OF THE CASE

This action was commenced by the respondents in the Superior Court of the State of Washington for Whatcom County to have the petitioner declared trustee for the respondents of the legal title to forty acres of timber land in Whatcom County, Washington, described as the Southwest quarter of the Northwest quarter (SW¼ NW¼), Section Three (3),

Township Thirty-nine (39) North, Range Six (6) E. W. M., Whatcom County, Washington, to enforce conveyance of the legal title and to have the title quieted as against the claim of the petitioner.

The land was selected by the Railway Company on May 5th, 1902, and patented to it on April 13th, 1908. The complaint alleged that the issuance of this patent was induced by fraud and mistake of fact, in that it was procured by the Railway Company upon representations that the land at the time of its selection was vacant and unoccupied public land of the United States, when, in fact, at the time of the filing of the selection list, one "W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader." (Tr. p. 5.)

The petitioner filed an answer and cross-complaint, denying these allegations and praying that its own title be quieted. A trial upon these issues resulted in a decree awarding to respondents the relief sought. Upon appeal to the Supreme Court (the highest court of the state) this decree was affirmed by Department No. 2 of that court (126 Wash. 312, 218 Pac. 210). Upon a rehearing en banc a majority of the court adhered to the opinion of the Department, and for the reasons therein given the judgment was af-

firmed. Final judgment to that effect was entered by the state Supreme Court on February 15th, 1924. The case is before this court on a writ of certiorari. 265 U. S. 578.

The land in question, while still unsurveyed, was selected by the St. Paul, Minneapolis & Manitoba Railway Company, predecessor of the petitioner, in a selection list filed in the Seattle Land Office on May 5th, 1902, under the Act of August 5th, 1892 (26 Stat. 390), entitled "An Act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota." That act recited that settlers who had gone upon certain lands granted to the Railway Company in those states were "liable to be ejected" under subsequent construction of the granting act, and provided for the relinquishment by the Railway Company of the title to such lands. In lieu of the land thus relinquished the act granted the Railway Company the right to select "an equal number of non-mineral public lands * * * of the United States, not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of the making of such selection, lying within any state into or through which the railroad owned by the said railway company runs, to the extent of the lands so relinquished and released."

The act of Congress further provided: "That upon filing by the said railway company at the Local Land Office of the Land District in which any tract of land selected in pursuance of this act shall lie, a list describing the tract or tracts selected, and the payment of the fees prescribed by law * * * and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law and delivered to said company a patent of the United States, conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the Local Land Office, shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within the period of three months after the lands including any such tract shall have been surveyed, and the plats thereof filed in the Local Land Office, a new selection list shall be filed by said company describing such tract according to survey; and in case such designation, as originally selected and described in the lists filed in the Local Land Office shall not precisely conform with the lines of the final survey, the said company shall be permitted to describe such tract anew, so as to produce such conformity."

In the respondents' complaint it was alleged that in the month of September or October, 1901, one W.

J. Tincker "squatted and settled" upon a quarter section, including the land in question, as a homestead and "that his residence thereon was continuous from his said first settlement down to and including the first day of August, 1906" (Comp., par. 6; Tr. p. 4). It was then alleged that the Railway Company's selection list of May 5th, 1902, was filed "at the time when the said W. J. Tincker was in the possession and occupancy of the said land and claiming to hold the same as a *bona fide* settler and homesteader" (Comp., par. 7; Tr. p. 5). These allegations were followed by the charge that the affidavit accompanying the selection list, declaring that the lands were vacant, unappropriated and of the character contemplated by the act, was false, since at that time the land "was in fact occupied and possessed by the plaintiffs' grantor, W. J. Tincker" (Com., par. 7; Tr. p. 5-6). It was further alleged that Tincker sold his so-called squatter's right to one Walter M. Smithey about August 1st, 1906, for Twenty-five Dollars (Comp., par. 6; Tr. p. 4, 65), and that on November 24th, 1906, Smithey transferred the claim for Fifty Dollars to the respondent, Charles W. Reed, who thereupon took up residence upon the land with his family (Comp., par. 6; Tr. p. 5, 80).

The plat of survey of the township was filed in the local land office on February 6th, 1907, and on that

day the respondent, Charles W. Reed, filed his application to enter the West half of the West half (W½ W½) of the section, including the forty acres in controversy, as a homestead. His application was received, but finally rejected as to the forty acres in controversy because of conflict with the Railway Company's selection (Tr. p. 5, 8). On February 23rd, 1907, the Railway Company, as provided in the Act of Congress, filed a supplemental selection list, describing the tract selected according to survey. (Tr. p. 6.) The land was patented to the Railway Company, without notice to the respondents, on April 13th, 1908 (Tr. p. 7). Petitions filed with the Land Department by the respondents, praying for the cancellation of the patent, were denied (Tr. pp. 8-11). On October 8th, 1915, a suit, praying similar relief to that claimed in the action now under review, was filed by the respondents against the petitioner in the United States District Court for the Western District of Washington, Northern Division. Demurrers to the complaint and amended complaint in that suit were sustained (Tr. p. 270). Respondents—plaintiffs in that suit—failed to plead further after the sustaining of the demurrer to the amended complaint, and on May 14th, 1917, the action was dismissed without prejudice (Tr. p. 277-278). Subsequently the present suit was brought.

It is undisputed that W. J. Tincker, who was designated in the complaint as a "*bona fide* settler and homesteader" at the time the selection list was filed, never in fact settled or resided upon the land, never cultivated an inch of it, and that during the entire period of his so-called claim to this land he maintained his home at Maple Falls, Washington, several miles away, where he resided with his wife and family.

The facts on the subject of Tincker's relationship to the land were stated by the State Supreme Court as follows:

"The facts are not greatly in dispute, so far as material to our present inquiry, and are shown to be substantially as follows: In September or October, 1901, one W. J. Tincker, being duly qualified to enter land under the homestead laws, went upon the Northwest quarter of Section 3, Township 39 North, Range 6 E., W. M., blazed a line around the same, posted notices on the four corners, and claimed the quarter section of land described as his homestead, it being then unsurveyed, vacant government land. He spent but a few hours on the land at that time, and did not go upon it again until some time between February and May, 1902. At that time he blazed a trail from the Nooksack River to the northwest corner of his claim, laid some poles or logs as a foundation for a cabin, which he did not complete; and from 1902 to 1906, Tincker was on his claim on an average of

once or twice a year, usually while on a hunting trip, and at these times he renewed his posted notices.

"During all of this period Tincker was a married man, living with his wife and family at Maple Falls, and there maintaining a home. He did no other work on the land, and neither he nor any member of his family ever actually resided upon or cultivated the land." (Tr. p. 292-293.)

The cabin foundation started by Tincker was on Lot 4, or the Northwest Quarter of the Northwest Quarter, of the Section, being the forty acre tract north of the land in controversy; and the trail ran only to the northwest corner of the Section. (Tr. p. 64.) Consequently no improvement was visible on the Southwest Quarter of the Northwest Quarter of the Section (the land in controversy) at the time of its selection by the Railway Company. Tincker sold his "squatter's right" in August, 1906, for $25.00 to one Smithey, who, after doing some work on the land, transferred his claim for $50.00 to the respondents in November, 1906. (Tr. p. 293.)

Upon these facts, which were not in dispute, either in the trial court or in the Supreme Court of the State, the petitioner stood upon the validity of its patent, and requested in both courts and at all stages the holding contained in the following

SPECIFICATION OF ERRORS

I.

The state courts erred in refusing to adopt the following conclusion of law requested by the petitioner:

No adverse right or claim had attached or been initiated to said southwest quarter of the northwest quarter of said Section Three (3), Township Tirty-nine (39), Range Six (6) E., W. M. at the time of the making of the selection of said land by the St. Paul, Minneapolis & Manitoba Railway Company on May 5, 1902, but said land was then vacant and unappropriated land of the United States and not interdicted mineral or reserved land, and was of the character contemplated by and subject to selection under the Act of Congress approved August 5, 1892, entitled "An Act for the Relief of Settlers upon Certain Lands in the States of North Dakota and South Dakota." (Tr. pp. 26-28.)

II.

The state courts erred in refusing to adopt the following conclusion of law requested by the petitioner:

The acts of Tincker did not initiate any right or claim which exempted the land from selection by the railway company under the said Act of Congress,

approved August 5, 1892, and no settlement upon said land was ever made by Tincker under the homestead laws of the United States. (Tr. pp. 25-28.)

III.

The state courts erred in entering a decree declaring the petitioner to be a trustee holding the legal title to the land in controversy for the use and benefit of the respondents, and quieting the respondents' title to said land. (Tr. pp. 42-45.)

IV.

The state courts erred in refusing to enter a decree quieting the petitioner's title to said land against the claim of the respondents. (Tr. pp. 29-31.)

ARGUMENT

The question of law thus submitted to the state courts and now submitted to this Court is this: Does the posting of notices upon the public domain, followed by the blazing of lines and the placing of a few poles in the form of a square, withdraw the land thus posted from the posibility of selection by a Railway Company under such an Act of Congress as the one involved here, when the one posting the notices never at any time (though pretending to claim the

land for more than four years) establishes residence upon the land or cultivates it in any degree, but constantly maintains a home with his family elsewhere?

I. The decision of the state courts is contrary to the decision of this Court in *Great Northern Railway Company v. Hower*, 236 U. S. 702. That case was cited to the Supreme Court of the State and mentioned in its opinion, but was passed with the mere statement that it was considered distinguishable. In that case a homesteader had built a barn, constructed a trail and posted notices of his claim on the land in controversy, and in addition had established his residence only a quarter of a mile away in the honest, but mistaken, belief that he was living upon the land he claimed. In that case, as in this, the land was unsurveyed at the time of the asserted initiation of the homestead claim. This Court held that, notwithstanding the claimant's effort to reside upon the land, his failure to do so left him without any support for his claim of title, holding that it could not "sanction such a liberal treatment of the statutory requirements as to residence" under the homestead laws as would be necessary in order to support title. Consequently the Railway Company, contesting with the homestead claimant under the identical statute involved here, prevailed. The homesteader in that case had done more than Tincker, the alleged claimant in this case,

had done. Tincker never lived within several miles of this land, nor made any effort to live upon it, while the homesteader in the *Hower* case made a *bona fide* effort to establish residence, but failed through a mistake of location. The cases are not distinguishable.

The State Supreme Court said: "It must be conceded that the acts of Tincker and Smithey were not sufficient to initiate a *bona fide* settlement under the homestead law," but held that a homestead claim to unsurveyed lands may be initiated without residence. This holding is contrary to the homestead laws. It is only by virtue of the Act of May 14th, 1880 (U. S. Comp. Stat. 1916, Sections 4536 *et seq.*) that homestead settlements are permitted to be made upon unsurveyed public lands. That Act provides that when one has settled upon public lands with the intention of claiming the same under the homestead laws, "his rights shall relate back to *the date of settlement.*"

This Court in *St. Paul. M. & M. R. Co. v. Donohue*, 210 U. S. 21, said that by this act, for the first time, "both as to surveyed and unsurveyed public lands, the right of the homestead settler was allowed to be initiated by and to arise from *the act of settlement.*"

And in *Great Northern R. Co. v. Hower*, 236 U. S. 702, *supra*, there was an unqualified holding that,

even as to unsurveyed lands, no homestead claim can be initiated except by "actual residence." The court in that case said:

"The statute of the United States (Rev. Stat. Sec. 2291) is specific in its requirements that, in order to obtain a patent for a homestead, the applicant must have actually resided upon or cultivated the same for a term of five years succeeding the filing of the claim, etc. The question, therefore, is, was an actual residence within the meaning of the statute sufficiently shown to comply with these provisions? * * *

"In this case it appears that the residence was not upon any part of the tract claimed by the homesteader; nor was the residence upon a continguous tract of land, but was entirely separate and apart from the land claimed. Under these circumstances we are constrained to the conclusion that the complaint, upon its face, made a case entitling the plaintiff in error to the relief sought."

Since Tincker concededly never made a *bona fide* settlement there was no "date of settlement" within the meaning of the Act of May 14th, 1880, to which his rights could be related back. Without settlement he could initiate no claim, and his occasional and infrequent visits to the land, indicating merely a possibility of settlement, but never in fact followed by residence or settlement, could not initiate an adverse right or claim within the meaning of the Act of August 5th, 1892.

II. The State Supreme Court, admitting that the foregoing ground of its decision was "not free from doubt," went a step farther, and held that "a claim of any nature," whether valid or invalid, exempts public land from selection by the Railway Company under the Act of August 5th, 1892. Such a rule is one of most serious concern to the petitioner and the other railway companies that have selected, or are entitled to select public land under the Act of August 5th, 1892, and similar laws. If mere speculative claims asserted to public lands without settlement thereon are sufficient to defeat the *bona fide* selections of others, then railway companies are at the mercy of speculators and professional land locators, who have only to procure the posting of notices by anyone upon the public domain in order to preserve the land from railway selection.

No case can be found supporting the decision of the state court, and the cases cited in its opinion are not in point. In *Nelson v. Northern Pacific R. Co.*, 188 U. S. 108, there was occupancy and residence upon the land by the homesteader, commencing three years before the rights of the railway company were fixed. In *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629, there was both an entry on file in the land office, and a settlement upon the land, at the time the railway company's map of definite location was filed.

In *St. Paul, M. & M. R. Co. v. Donohue*, 210 U. S. 21, the homestead claimant had "settled upon unsurveyed land" and "had built his residence" thereon two years and eight months before the Railway Company filed its selection list.

In *Hastings & D. R. Co. v. Whitney*, 132 U. S. 357, a soldier's entry of land had been allowed and was on file in the Land Office at the time the railway company filed its map of definite location. In *Whitney v. Taylor*, 158 U. S. 85, there was a preemption entry on file in the Land Office when the map of definite location was filed. In both of these cases the holding was that a mere defect in the formal entry did not render the same a nullity.

In *Northern Pacific R. Co. v. Trodick*, 221 U. S. 208, the situation of the parties was thus described by the court: "The company filed its map of definite location on July 6th, 1883, but one Lemline was then in the actual occupancy of the land as a residence. * * * He continuously resided on the land until his death, which did not occur until 1889."

In *United States v. Great Northern R. Co.*, 254 Fed. 522, there was a finding that in March, 1902 (prior to the filing of the railway company's selection list), a settler had taken up his residence upon the land "and continued to live there for 2 or 2½ years."

It is manifest that none of these decisions lends countenance to the view that a homestead claim can be initiated by any act short of settlement or formal land office entry. On the other hand, the decisions of the Land Department support our contention that the acts of Tincker in the present case did not segregate the land from selection by the railway company.

The following is quoted from *Meyer v. Northern Pacific R. Co.*, 31 L. D. 926:

"Meyer alleges settlement upon this land about two months prior to the filing of the railroad selection list, and it is claimed that said selection was therefore subject to the claim that might ripen under such settlement. As Meyer's claim rested upon settlement made upon unsurveyed land with a view to entry under the homestead laws, it was necessary that he should, in order that such right or claim might be successfully asserted as against an intervening claim, show that he established an actual residence upon the land within a reasonable time after settlement, and that such residence had been maintained to the date of the presentation of his homestead application in furtherance of such claim or right under the settlement as alleged. Failing in this, it must be held that no such right or claim was initiated as served to defeat the railroad's selection."

In *O'Brien v. Chamberlain*, 29 L. D. 218, it was said:

"It has been repeatedly ruled by this Department that a settlement upon public land must be followed

within a reasonable time by actual residence in order to *create* in the claimant any rights thereunder; so that, if it be admitted that Annie O'Brien was, at the time of her alleged purchase of the improvements placed upon this land by her father, duly qualified, and that by such purchase she initiated a right to the land, it must be held in the presence of the adverse claim that such right was waived or lost by her failure to take up a residence upon the land within a reasonable time thereafter. It therefore follows that the rejection of her application by the local officers was proper."

In *Hastings & D. R. Co. v. Grinden*, 27 L. D. 137, it was held that a possessory claim to land and cultivation thereof, unaccompanied by actual residence thereon, will not defeat the right of a railway company to make indemnity selection thereof. The court said:

"The question raised by the appeal is, had the present homestead applicant such a claim to the land on October 29, 1891, the date of the Company's selection, as would bar the allowance of said selection? From the showing made in support of her application it appears that she purchased the improvements upon this land in October, 1889, and she thereafter cultivated the breaking upon the tract, but did not take up a residence on the land until June 1, 1892, more than two and one-half years from the date she took possession of the tract. While under the departmental decisions settlement can be effected without actual residence, the settlement must be followed within a reasonable time by actual residence in order

to claim any rights thereunder. * * * It would seem that if she initiated any right by purchase of the improvements and by her possession and cultivation of this tract, it was waived and lost by her failure to take up a residence upon the tract for the period of two years preceding the Company's selection. It is therefore held that she had no such claim to this tract as would bar its selection on account of the grant.

"A claim of occupancy set up to defeat the right of indemnity selection cannot be recognized if it appears that at the date of selection the alleged occupant had not established residence upon the tract, but was maintaining a home elsewhere, although he may have fenced and cultivated the land and erected buildings thereon."

Banks v. Northern Pacific R. Co., 25 L. D. 542.

These cases were followed in *Elisenson v. Hastings & D. R. Co.*, 28 L. D. 572, where settlement was claimed prior to the railroad's selection by virtue of the purchase of the improvements of a prior settler, and continued improvement of the land, but residence was not commenced until six months after the selection.

In *Northern Pacific R. Co. v. Grimes*, 24 L. D. 452, it was said:

"Examination of the testimony introduced by Grimes fails to show that he had ever lived upon the land or had a place of abode thereon. Grubbing, ditching and fencing, without residence, cannot be deemed

sufficient to except the land from the selection of the railroad companies.

"The occupancy of land for the sole purpose of speculating in the improvements thereon does not constitute a *bona fide* settlement that will except the land from indemnity selections."

Humiston v. Northern Pacific R. Co., 23 L. D. 543.

Settlement is not effected by the arrangement of a few logs in the form of a square.

Barrott v. Linney, 2 L. D. 26.

Wister v. Rowe, 3 L. D. 447.

Fuller v. Clibon, 15 L. D. 231.

The Land Department, it will be seen, has consistently held that a claimant's initial acts of possession must be followed by actual residence within a reasonable time, in order to initiate a homestead claim. That is to say, there can be no settlement without residence. Other decisions defining the word "settlement" give it a similar meaning.

In *Bratton v. Cross*, 22 Kas. 469, construing a statute conferring the right of purchase of school lands upon persons having "settled upon and improved" the land, or who are "actual settlers" thereon, it was said:

"To settle upon land we think means to fix one's place of residence thereon; and a settler upon land is

one who resides thereon. This is in accordance with all the definitions of the words settle, settler, and settlement, when applied to settlements upon land."

This opinion was concurred in by Justice Brewer, afterwards a member of the United States Supreme Court. The court in this case points cut that a *bona fide* settler might, in advance of residence, commence the construction of improvements, which, *if followed by residence*, would cause his rights to date from the first moment of his occupancy. This is in accordance with the decisions of the United States Land Department, cited above, holding that a claim to a homestead, although publicly manifested, is void *ab initio* if not followed within a reasonable time by actual residence.

In *Mosely v. Torrence*, 71 Cal. 318, 12 Pac. 430, the court was called upon to construe a statute of California, permitting the purchase of state lands by "actual settlers thereon." The defendant had never personally resided on the land, but had enclosed it and cultivated portions of it. The court held that he was not entitled to make the purchase, saying "actual settlement means actual residence."

The word "settle," when applied to lands, imports the idea of a permanent habitation, and a settler within the preemption laws of the United States is

one who has actually resided on the land claimed. *Burleson v. Durham*, 46 Texas 152 (citing Webster's Dictionary). See also *Mellen v. Great Western Beet Sugar Co.*, 122 Pac. 30, 21 Idaho 353, Ann. Cases 1913 D, 621.

In *State v. Strain*, -- Tex. Civ. App. --, 25 S. W. 1003, a prospective settler hauled lumber upon state land for the purpose of building a house, camped upon it for several nights, and then, thinking that the State Land Board had lawfully abrogated the requirement that the land be settled within six months, left the land with the intention of returning, but subsequently sold it. It was held that these acts did not constitute a settlement under a state statute requiring settlement as a condition of purchase. The court said:

"To constitute a settlement within the contemplation of the law, the intention to settle must exist, accompanied by such acts as show a consummation of that intention within the period fixed by the statute. If the settlement is once an 'accomplished fact' a subsequent abandonment is immaterial; but if, before the fact is accomplished, the intention to settle is abandoned, it cannot be said that an actual settlement has been effected."

In the recent case of *Bowen v. Hickey*, (Cal. App.), 200 Pac. 46, certiorari denied, 257 U. S. 656, it was held that an entryman does not acquire or maintain a residence by occasional visits or by going upon the

land for the purpose of merely formal compliance with the law, since substantial residence and good faith are necessary.

This review of the authorities justifies the statement that one claiming settlement upon public lands cannot acquire the rights of a settler except by placing his residence there.

In the course of the discussion of the law of the case, the state supreme court injects one misleading statement of fact, saying that "at the very time its (the Railway Company's) list was filed Tincker was on the land in person, engaged in cutting trails, building a cabin, and the like." This statement is incorrect in two respects. First, as already stated, Tincker's cabin foundation and trail were not upon the forty acres selected by the Railway Company, but were on another subdivision, almost a quarter of a mile to the north. Second, Tincker placed the time of his visit to the land when this work was done very indefinitely as "some time between February and May, 1902." (Tr. p. 52). When Tincker himself was uncertain within a range of four months as to the time of his visit to the land, it was hardly correct for the state court to say that he was there and at work on May 5th, 1902, the date the list was filed. The court's statement was no doubt inadvertent, since

the opinion had stated in the preliminary outline of the facts that Tincker was upon the land "sometime between February and May, 1902."

Two timber cruisers who examined the land for the Railway Company in the latter part of April, 1902, found no improvements of any kind upon it (Tr. pp. 121, 127) nor did they find the notices said to have been posted by Tincker on the four corners of his claim the preceding fall. (Tr. pp. 120, 127.)

It is clear from the evidence of the two witnesses just mentioned (Tr. 118-130) that the Railway Company was endeavoring in good faith while selecting its lands to avoid conflict with settlers. No fraud was committed, but if an adverse right or claim had attached or been initiated to the land at the time the Railway Company filed its list, the Railway Company was mistaken in making the selection and was not entitled to the patent. The vital question then is whether or not Tincker had made a settlement on the land within the meaning of the homestead laws prior to the time the selection list was filed. It is respectfully submitted that since the testimony of Tincker himself shows that he never established a residence upon the land, the Railway Company made no mistake in selecting it and its patent should be sustained.

When Congress, in the Act of August 5th, 1892, limited the Railway Company's right of selection to land "to which no adverse right or claim" had "attached or been initiated," it must have meant adverse rights or claims recognized under other Federal land laws. Both the railroad and the settler were objects of the Nation's bounty and encouragement and it was no doubt the congressional purpose to avoid all possible conflicts between them. The Railway Company was not permitted to question the sufficiency of a settler's compliance with the land laws after his initiation of a claim. On the other hand, it could not have been the intent of Congress to allow the rights granted to the Railway Company to be frustrated by merely colorable or speculative claims on the part of settlers evincing no intent to comply with the primary purpose of the land laws—the settlement of the public domain. Those laws were enacted "to secure homesteads to actual settlers upon the public domain." The Act of 1880 (U. S. Compiled Statutes, 1916, Sections 4536 *et seq.*), which first extended the homestead privilege to unsurveyed lands, allowed the right of the settler to arise only from "the act of settlement." *St. Paul M. & M. R. Co. v. Donohue*, 210 U. S. 21. It is admitted in the State Supreme Court's opinion that there was in this case no bona fide homestead settlement upon the land at the time

the selection list was filed. The state court has, however, held that the land was segregated from selection by the posting of notices, the blazing of trails and the arrangement of a few poles in the form of a square. But Tincker, the party performing these acts, did not follow them by settlement or by any effort to establish residence on the land in a period of nearly five years, at the end of which he sold his so-called "squatter's right" to another. If the Railway Company's patent is to be set aside, the decision must rest upon the ground that a homestead right can be initiated without settlement.

In *Tarpey v. Madsen*, 178 U. S. 215, the court referred to the danger of allowing the title of a railway company to be defeated by "fugitive and uncertain testimony of occupation" on the part of some former settler. The danger to the security of titles which must result from the state court's decision in the instant case is manifest. In the State of Washington and other western states a substantial portion of the land titles are deraigned from railroad grants. Are these all subject to be set aside upon the testimony of any roving hunter or trapper who may happen to recall that many years ago he had a fleeting intention of establishing a homestead and had indicated that intention by the posting of notices, the commencement of a cabin or the blazing of a trail—an intention

which he soon forgot or abandoned? A holding of this kind goes far beyond the purpose announced in the homestead laws of securing homesteads "to actual settlers upon the public domain."

Respectfully submitted,

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Solicitors for Petitioner.